

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)	
)	
Market Entry and Regulation)	IB Docket No. 95-22
of Foreign-Affiliated)	RM-8355
Entities)	RM-8392

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REPLY COMMENTS OF COOK INLET REGION, INC.

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SUMMARY

The Commission has long recognized that genuine diversity of media ownership is critical to the presentation of diverse viewpoints through the nation's media. It has also recognized that lack of access to capital is the principal impediment to the acquisition of broadcast licenses by socially and economically disadvantaged individuals and entities, including minorities and small business owners. In order to facilitate access to the capital needed to obtain broadcast licenses, the Commission should establish a rebuttable presumption that foreign investment in a socially and economically disadvantaged enterprise above the 25% cap established in Section 310(b)(4) of the Communications Act is in the public interest and therefore permissible so long as there is non-foreign de jure and de facto control of the socially and economically disadvantaged enterprise in which the foreign investment is made.

I. INTRODUCTION.

Cook Inlet Region, Inc. ("Cook Inlet"), one of the 12 regional corporations established by Congress under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 et seq. ("ANCSA"), submits these Reply Comments to counter the Comments of the Minority Media Telecommunications Council in opposition to liberalization of foreign investment opportunity in broadcast licensees pursuant to 47 U.S.C. § 310(b)(4) and to offer a race and gender-neutral approach to assisting socially and economically disadvantaged entities to become broadcast owners and thereby increase diversity. Cook Inlet's approach will provide a hand -- but not a government hand-out -- to those who qualify as socially and economically disadvantaged within the meaning of Section 8(a) of the Small Business Act, 15 U.S.C. § 637 (a), and the Section 8(a) program Rules issued by the Small Business Administration, 13 C.F.R. § 124, which will include minority and female owned and controlled enterprises, among others.

Cook Inlet is owned by approximately 6,700 Native Alaskan shareholders of predominantly Athabascan, Eskimo and Aleut descent. A majority of the company's shareholders are women. Under ANCSA, and "[f]or all purposes of Federal law," Cook Inlet and each of its qualifying subsidiaries, joint ventures, and partnerships is "considered to be a corporation owned and controlled by [Alaskan] Natives and a minority and an economically disadvantaged business enterprise"

43 U.S.C. § 1626(e). Accordingly, Cook Inlet qualified as a purchaser of broadcast properties under the Commission's former Tax Certificate Policies. The Commission's Tax Certificate Policies enabled Cook Inlet to acquire properties that probably it would not have been able to acquire otherwise.^{1/}

Although use of tax certificates as a means of facilitating acquisition of broadcast and cable properties by qualified women and minorities terminated with enactment of Public Law 104-7 (109 Stat. 93-94) on April 11, 1995, the Commission has in this proceeding an excellent opportunity to enhance access to capital and thereby facilitate such acquisitions by the different means of permitting an increased level of foreign investment in qualified companies that control broadcast licensees.

II. THE COMMISSION SHOULD USE ITS DISCRETION UNDER SECTION 310(b)(4) TO PROMOTE FOREIGN INVESTMENT IN BROADCAST ENTERPRISES CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS AND ENTITIES.

A. Commission Interpretation of Section 310(b)(4).

Section 310(b)(4) of the Communications Act only prohibits foreign ownership of more than 25% of a company that

^{1/} Cook Inlet acquired control of WTNH(TV), New Haven, Connecticut, on January 2, 1986, acquired control of eleven AM and FM radio stations on January 20, 1988, and acquired control of WSMV (TV), Nashville, Tennessee on June 7, 1989. Although Cook Inlet relinquished control of these stations, it still maintains a substantial interest in WTNH (TV) through its ownership of approximately 10.5% of LIN Television which acquired the station from Cook Inlet in late 1994.

directly or indirectly controls a broadcast licensee "if the Commission finds that the public interest will be served by" such prohibition. Fox Television Stations, Inc., FCC 95-188 (May 4, 1995). However, until very recently, the Commission has historically applied Section 310(b) as an almost inflexible ban against any foreign investment above the 25% limit. In the few cases where the Commission has approved foreign investment in excess of 25%, the licensee has almost always been a common carrier, which does not control the content of the messages it transmits.^{2/}

Although in every case the Commission must affirmatively approve foreign investment above 25%, Fox Television Stations, Inc., supra, to help to channel foreign investment into broadcast enterprises controlled by the socially and economically disadvantaged, the Commission should announce that in the approval process it will presume, subject to rebuttal, that the public interest will be served by foreign investment above 25% in an enterprise that is de jure and de facto controlled by socially and economically disadvantaged persons or entities.

As has been discussed at length in many of the submissions in this proceeding, Section 310(b) and the Commission's interpretation of it reflects the fear of foreign

^{2/} See, e.g., Teleport Transmission Holdings, Inc., 8 FCC Rcd 3063 (1993); Millicom Inc., 4 FCC Rcd 4846 (1989); see also Notice of Proposed Rule Making in IB Docket No. 95-22 (Released February 17, 1995), p. 9.

domination of this country's airwaves widely held during the isolationist inter-war period. Today, however, few Americans regard this as a threat to their national security as they did sixty years ago. Equally important, Section 310(b) was enacted at a time when very few radio stations (and no television stations) were in existence and it was more credible to fear foreign domination of these few outlets. Today's multi-channel universe is entirely different. Today, there are over 11,000 commercial television and radio stations on the air, cable television systems are accessible to 97% of the country, and there are direct broadcast satellite and myriad other forms of electronic media.

Fears that foreign investment in radio and television stations will lead to undue foreign influence over our national media can no longer be given much credence. Ironically, no foreign investment restrictions prohibit aliens from owning newspapers or cable television systems, two media that have far less diversity than the broadcast industry, and no evidence has been presented that foreign investment in these sectors has had any deleterious effects on the public.

The Commission appears no longer rigidly to reject the public interest benefits of foreign investment greater than 25% in broadcast enterprises. Indeed, in the recent Fox Television Stations, Inc., supra at 72-73, the Commission has made clear that it is willing to consider a showing as to whether the public interest would be served by allowing a

foreign company to retain its 99% capital investment in the parent company of a television network and eight television stations. As any foreign investment in excess of 25% would require the specific approval of the Commission, even with the proposed presumption the Commission would retain its power to disapprove any foreign investment in excess of 25% if it felt that such investment would threaten the national interest (for example, investment by a person or company from a country not friendly to the United States).

**B. Lack of Access to Capital: The Principal
Impediment to Diversification of Media Ownership**

The Commission's former inflexible interpretation of Section 310(b)(4) has served to restrict an important source of capital that might be invested in this country's broadcast enterprises controlled by socially and economically disadvantaged individuals and entities. As has been extensively documented by the Commission, minority and female controlled enterprises, many of which qualify as socially and economically disadvantaged, face great difficulties in attracting the capital necessary to obtain broadcast licenses. As the Commission noted in its current Notice of Proposed Rule Making on Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities: "In the years since the Commission and Congress began studying the issue of minority ownership, considerable evidence has been presented showing that the primary impediment to minorities seeking to enter the

communications industry or to increase their mass media holdings is a lack of access to capital."^{3/} In that Notice, the Commission emphasized that Congress in passing the Small Business Credit and Business Opportunity Enhancement Act of 1992 specifically found minorities to have "extraordinary" difficulties in obtaining capital.^{4/}

A direct result of the lack of access by minorities to capital is the extremely small percentage of broadcast licenses that minorities control relative to their proportion of the population. In its Minority and Female Ownership Notice, the Commission noted that minorities constitute 23% of the national workforce but control only 2.9% of the 11,128 commercial radio and television stations on the air.^{5/} In other words, the share of broadcast licenses that minorities hold is only one eighth of their share of the national workforce.

The Commission has long recognized the importance of increasing this low proportion of minority ownership if this country is to achieve the very important goal of diversity in the broadcast industry. As the Commission stated in the Minority and Female Ownership Notice: "It has long been the

^{3/} Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140 (adopted December 15, 1994) at p. 8 ("Minority and Female Ownership Notice").

^{4/} Id., quoting the Small Business Credit and Business Opportunity Enhancement Act of 1992, 15 U.S.C. § 631 note, Pub. L. No. 102-366, 106 Stat. 986 §§ 112(4), 331(a)(4).

^{5/} Id. at 5.

judgment of Congress that promoting minority ownership of broadcasting and cable television facilities serves to enhance the diversity of viewpoints presented on our nation's radio and television stations and cable systems."^{6/} The Supreme Court, likewise, has found:

A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group.... [T]he conclusion that there is a nexus between minority ownership and broadcasting diversity ... is corroborated by a host of empirical evidence.^{7/}

The difficulties that small businesses have in attracting the capital necessary to obtain broadcast licenses have not been as well-documented as those facing minorities. Nevertheless, in including small businesses as Designated Entities in the auction of spectrum for Personal Communications Services in the 2 GHz band, the Commission did accept the finding that Congress made in the Small Business Credit and Business Opportunity Enhancement Act of 1992 that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."^{8/} With the

^{6/} Id. at 2.

^{7/} Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 579-80 (1990).

^{8/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, in PP Docket No. 93-253, FCC 94-178, Federal Register, Vol. 49, (continued...)

obstacles they face in obtaining credit, small businesses often find it quite hard to amass the large amounts of capital necessary to acquire and operate broadcast licenses. It is important to ensure that small businesses, since they represent one of the most diverse and vibrant sectors of the national economy, not be prevented by their lack of access to capital from helping to diversify the ownership of the broadcast industry.

C. A Presumption is Warranted that Foreign Investment in a Domestically Controlled Socially and Economically Disadvantaged Broadcast Enterprise Would Be in the Public Interest.

In light of the importance of providing opportunities for socially and economically disadvantaged enterprises (which include many minorities and small businesses) to obtain broadcasting licenses and the extensive record that lack of access to capital is the chief impediment hindering such opportunities, the Commission should proactively seek measures that will assist disadvantaged enterprises in gaining access to capital. One excellent and ready source of capital that remains largely untapped is that of foreign investors. The Commission ought to make clear that it encourages this source of capital to meet the pressing

^{8/}(...continued)

No. 140, p. 37582 (July 22, 1994), quoting Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a)(3), Pub. Law 102-366 (Sept. 4, 1992).

demand of socially and economically disadvantaged enterprises for capital.

Cook Inlet thus proposes that the Commission proclaim that it will presume that such foreign investment will serve the public interest and therefore be allowable under Section 310(b)(4) unless the Commission rebuts the presumption by making a specific finding to the contrary when presented by the required application or petition to allow greater than 25% foreign ownership. Improving the access of disadvantaged enterprises to foreign capital would greatly increase the diversity of this nation's broadcast industry, which is one of the Commission's central goals. In addition, the inflow of capital would increase competition within the industry by facilitating the entry of new competitors, all to the great benefit of American consumers. Finally, it would accomplish a desired result in a manner that is race and gender-neutral and in a manner that would not adversely impact the national deficit or budget or otherwise cost the taxpayers any money.

Cook Inlet believes that the Commission should use a well-established test for eligibility for the proposed presumption so as not to undercut the purpose of the proposal -- improving access to capital for socially and economically disadvantaged entities to increase diversity in ownership of broadcast stations. Cook Inlet therefore urges the Commission to consider the socially and economically disadvantaged

criteria established by the Small Business Administration under Section 8(a) of the Small Business Act.^{2/} As applied by the Small Business Administration, a person of any race or gender can qualify as socially and economically disadvantaged; in order to qualify, a person must demonstrate both social and economic disadvantage. Hence, wealthy individuals from minority groups may not qualify, while economically disadvantaged persons from non-minority groups may qualify if they can show social disadvantage.

According to the regulations issued pursuant to Section 8(a), the concept of social disadvantage is defined as follows:

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.^{10/}

In addition to social disadvantage, an individual must show economic disadvantage:

For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to

^{2/} 15 U.S.C. § 637(a).

^{10/} 13 C.F.R. § 124.105(a).

preclude such individuals from successfully competing in the open market.^{11/}

Cook Inlet also proposes that the Commission establish strict anti-sham safeguards that will ensure the program not only works as intended but is seen to be working as intended by outside observers. These safeguards, which should calm any misplaced fears of foreign domination of America's airwaves, should require that U.S. citizens maintain both de jure and de facto control of the enterprise and possess at least 25% of its fully diluted equity. No options, puts, or calls should be permitted, and no transfer of the controlling interest to a non-disadvantaged enterprise should be granted until at least five years after the initial foreign investment was approved by the Commission. Finally, the Commission should establish strict penalties and enforcement procedures for any violations of these rules.

Cook Inlet points to its own record in acquiring broadcast licenses under the recently repealed tax certificate statute (28 U.S.C. § 1071) as evidence that these control safeguards are eminently workable in practice. In every case in which Cook Inlet acquired control of a broadcast station, it (or its wholly owned subsidiary) has been the controlling general partner in the licensee in both form and substance, and has had at least a twenty to one hundred percent equity ownership interest in the licensee. Cook Inlet's controlling

^{11/} 13 C.F.R. § 124.106(a)(1)(i).

interest has never been a pyramided percentage of voting power or one which bears little relationship to equity or economic stake. And in every case, Cook Inlet exercised very real control of the licensee and its day-to-day operations throughout the period of its ownership.

Cook Inlet recognizes that the Commission has long been adverse to allowing foreigners to invest substantially in broadcast licenses for fear of the foreign owners' control of the content of the broadcasts. Given the importance of the goal of diversifying ownership among broadcast licensees, however, the Commission should encourage a higher level of foreign investment in broadcast licensees controlled by the disadvantaged. Since foreign investors will not be permitted to have de jure or de facto control over such licensees, and since foreign investment likely would be in only one or a few stations among those available in every community, the Commission need not fear that foreign investment in certain broadcast licensees controlled by the disadvantaged will have any adverse impact on the public interest or the national security.

**D. Response to Comments of the Minority
Media Telecommunications Council.**

In Comments in this proceeding filed on March 28, 1995, the Minority Media Telecommunications Council ("MMTC") opposed liberalization of the Commission's implementation of Section 310(b)(4) on the grounds that any inflow of foreign

investment would (a) drive the price of stations up and make it more difficult for minorities to acquire them; and (b) be of little avail to minority enterprises since foreign capital "arrives in this country only in units too large for most minority deals". Even if these two points could be substantiated, they fail to credit the potentially positive role that foreign capital could play in assisting the disadvantaged (including minorities) to acquire broadcast licenses if the channeling of that capital to disadvantaged enterprises were encouraged by the Commission. Cook Inlet believes its proposal would provide such encouragement.

III. CONCLUSION.

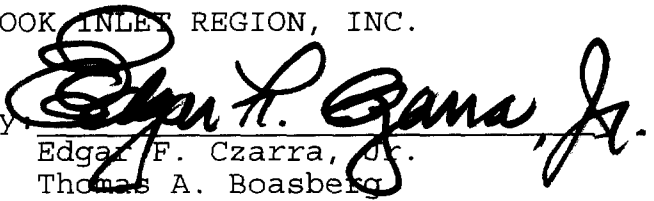
In sum, a presumption in favor of allowing foreign investors to exceed the 25% cap of Section 310(b)(4) if their investment is in a broadcast enterprise controlled by socially and economically disadvantaged individuals would create a win-win situation for Americans. On the one hand, such disadvantaged enterprises would benefit from gaining at long last improved access to capital so critical for them to compete in the broadcast industry. At the same time, American consumers would benefit from the increased competition and increased diversity that these disadvantaged enterprises would bring to the industry. The safeguards built into the proposal, including the requirement that the disadvantaged enterprise maintain at least 25% of any license owner's fully diluted equity, plus de jure and de facto control, ensure that the

proposal's aims will be achieved and the public interest will be served.

Respectfully submitted,

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